

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Addax Music Co., Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Years 1971 - 1977. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of December, 1984, he served the within notice of Decision by certified mail upon Addax Music Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Addax Music Co., Inc.
c/o Gulf & Western Industries, Inc.
High Ridge Park
Stamford, CT 06905

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of December, 1984.

David Parchuck

James A. Hayduk
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Addax Music Co., Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation
Franchise Tax under Article 9A of the Tax Law for :
the Years 1971 - 1977.

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of December, 1984, he served the within notice of Decision by certified mail upon Marvin Rosenblum, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marvin Rosenblum
c/o Gulf & Western Industries, Inc.
High Ridge Park
Stamford, CT 06905

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
14th day of December, 1984.

David Parchuck

Samuel A. Chapman
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 14, 1984

Addax Music Co., Inc.
c/o Gulf & Western Industries, Inc.
High Ridge Park
Stamford, CT 06905

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Marvin Rosenblum
c/o Gulf & Western Industries, Inc.
High Ridge Park
Stamford, CT 06905
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ADDAX MUSIC COMPANY, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Franchise Tax on Business Corporations:	:	
under Article 9-A of the Tax Law for the Years	:	
1971 through 1977.	:	

Petitioner, Addax Music Company, Inc., c/o Gulf + Western Industries, Inc., High Ridge Park, Stamford, Connecticut 06905, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the years 1971 through 1977 (File No. 28376).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 20, 1981 at 1:30 P.M. Petitioner appeared by Marvin Rosenblum, Manager of State Taxes. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner, which owned copyrights to certain musical compositions and received royalties thereon through its membership in ASCAP, employed capital or was doing business in this state so as to be subject to the franchise tax under Article 9-A and to the license fee imposed by section 181 of the Tax Law.

FINDINGS OF FACT

1. On October 15, 1979, the Audit Division issued to petitioner, Addax Music Company, Inc. ("Addax"), Notices of Estimated Deficiency for each of the

years at issue, asserting franchise taxes due under Article 9-A of the Tax Law, plus penalties and interest, scheduled as follows:

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>PENALTY</u>	<u>TOTAL</u>
1971	\$ 2,000.00	\$ 910.00	\$ 500.00	\$ 3,410.00
1972	2,000.00	987.00	500.00	3,487.00
1973	2,000.00	817.00	500.00	3,317.00
1974	2,000.00	779.00	500.00	3,279.00
1975	2,400.00	731.00	600.00	3,731.00
1976	2,000.00	439.00	500.00	2,939.00
1977	2,000.00	269.00	500.00	2,769.00
	<u>\$14,400.00</u>	<u>\$4,932.00</u>	<u>\$3,600.00</u>	<u>\$22,932.00</u>

2. Addax is a music publisher, organized under California law. It is a subsidiary of Paramount Pictures ("Paramount"), which in turn is a subsidiary of Gulf + Western Industries, Inc. Addax has no employees of its own; all of its accounting and administrative functions are performed by employees of related corporations, such as Paramount. Its records are maintained by Paramount employees in California.

3. Petitioner's only assets consist of copyrights to certain musical compositions. Petitioner's only income consists of the royalties earned on such copyrights.

4. Addax receives its royalty payments via its membership in the American Society of Composers, Authors and Publishers ("ASCAP"), a nonprofit membership association of composers, lyricists and music publishers.

5. The copyrighted musical works of ASCAP's many members constitute ASCAP's "repertory". ASCAP grants non-exclusive blanket licenses, under which the license-holder is entitled to an unlimited number of non-dramatic public performances of any or all of the musical works in ASCAP's repertory. Any users who perform in public any of the musical works in ASCAP's repertory, and whose performances are not exempted by a specific provision of copyright law, must have a license from ASCAP in order to avoid potential liability under

copyright law for unauthorized use. ASCAP license-holders range from the major television networks to local taverns. License fees charged by ASCAP are negotiated with the various license-holders and vary among the different types of license-holders.

6. It is the sum of all license fees collected by ASCAP, less ASCAP's operating costs, which constitutes the amount of royalties distributable to ASCAP's members. ASCAP distributes one-half of the royalties collected to its writer members and the other one-half to its publisher members. Distribution is based upon a scientifically designed, nationwide survey of performances on radio, local and network television and background services and performances in symphony and concert halls. An ASCAP member receives royalties for the use of his music, with the amount of royalties received determined by a formula based on the frequency with which his music is performed and in which medium, as revealed by the survey.

7. ASCAP cannot determine from its records how much of a member's royalty for a particular composition is derived from a particular state. It can only ascertain the amount of fees collected from licensees in a particular state. Following are the percentages of fees from New York licensees, of the total fees collected from all licensees in the United States, for the years at issue:

<u>YEAR</u>	<u>PERCENTAGE FEES FROM N.Y. LICENSEES/FEES FROM U.S. LICENSEES</u>
1971	9.855
1972	10.403
1973	12.100
1974	10.85
1975	12.31
1976	9.77
1977	9.51

8. Petitioner did not pay a license fee nor file a New York franchise tax report for any of the years at issue. Petitioner failed to provide to the

Audit Division copies of its Federal corporation tax returns for the years 1971 through 1977, as requested.

9. The Audit Division used the percentages of ASCAP's fees derived from New York (see Finding of Fact 7) in order to estimate the proportion of petitioner's income which was allocable to this state.

CONCLUSIONS OF LAW

A. That subdivision (1) of section 209 of the Tax Law imposes a franchise tax on a foreign corporation:

"[f]or the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state..."

The regulations note that the term "doing business" is "used in a comprehensive sense" and that "every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be 'doing business' for the purposes of the tax." 20 NYCRR 1-3.2(b)(1), effective for taxable years beginning on or after January 1, 1976; former Section 1.6(a), Ruling of the State Tax Commisision, March 14, 1962.

The regulations likewise note that the term "employing capital" is "used in a comprehensive sense" and that "[a]ny of a large variety of uses, which may overlap other activities, may give rise to taxable status." 20 NYCRR 1-3.2(c).

B. That subdivision (1) of section 181 of Article 9 requires every foreign corporation (with certain exceptions not relevant here) which does business in this state to pay a license fee.

C. That for purposes of taxation, intangibles are treated as having a situs at the owner's domicile. E.g., Curry v. McCanless, 307 U.S. 357 (1939); Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83 (1929). However, the intangibles

may acquire a situs for taxation other than the owner's domicile if they have become an integral part of some local business of the owner.

"The assertion that petitioner's capital was all outside the State of New York rests upon the ancient maxim (mobilia sequuntur personam) that movables follow the person of the owner and that as petitioner secured its franchise to be a corporation in Delaware, the juristic concept follows that its person, and, therefore, its intangible property, was there. Latterly intangibles have been determined to have a taxable situs of their own which may be away from the domicile of the owner if they have become integral parts of some local business. (Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 213.) The certificates of stock kept in New York to be traded in there, had acquired a 'business situs' and a 'commercial domicile' there at the place where 'the management functioned'. (Wheeling Steel Corp. v. Fox, 298 U.S. 193.)" People ex rel. Tobacco & Allied Stocks, Inc. v. Graves, 250 A.D. 149, 154 (3d Dept. 1937).

The Audit Division equated petitioner's holding of intangible property (copyrights) and collection of royalties therefrom with "doing business" or "employing capital" in this state. It thus failed to address the crucial question, namely, whether the copyrights were an integral part of some local business activity of petitioner.

D. That the test of whether a corporation is engaged in business or passively holding property has been stated as follows:

"The fair test to be derived from a consideration of all of [these cases] is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails, and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as are essential to those purposes." Von Baumbach v. Sargent Land Co., 242 U.S. 503, 516 (1917).

E. That petitioner, through ASCAP, licensed the use of its copyrighted compositions, collecting its royalties thereon based upon ASCAP's user fee distribution formula as applied to the results of ASCAP's performance monitoring survey. Neither petitioner nor ASCAP was able to provide information as to a state by state breakdown of performances as monitored by ASCAP's survey or as to

the relationship, if any, between such breakdown and the formula distribution of user fees. Nonetheless, it is entirely reasonable to conclude, in view of the percentage of total ASCAP license fees paid by New York users, that a part of petitioner's royalties were derived from licenses for and (ostensibly) performances of its copyrighted compositions in New York.


F. That petitioner chose to utilize the expedience of an intermediary, namely ASCAP, to monitor the use of petitioner's compositions and collect the royalties thereon to which petitioner was entitled, rather than to perform these acts on its own. The record is silent regarding whether ASCAP or petitioner attempts or is responsible for monitoring or policing for any unauthorized (i.e. unlicensed) use or performance of petitioner's compositions and pursuing redress therefor. In view of the obvious practical difficulties petitioner would face in attempting to locate, licence and monitor the use of its compositions on its own, petitioner's choice of becoming a member of ASCAP as a means of securing the rightful benefits of having its copyrighted compositions performed in New York (and elsewhere) is a logical business decision. It is also petitioner's choice of its means of conducting and effecting its business activity within New York. Such choice represents petitioner's means of "continued efforts in the pursuit of profit and gain" as well as the "local business" into which petitioner's intangibles were, of necessity, integrated. Accordingly, petitioner was properly subject to the imposition of franchise tax under Article 9-A and to the licence fee imposed by section 181 of the Tax Law.

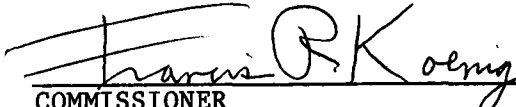
E. That the petition of Addax Music Company, Inc. is hereby denied, and the notices of estimated deficiency issued October 15, 1979 are sustained in full.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 14 1984


PRESIDENT


COMMISSIONER


COMMISSIONER